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No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,
Petitioners,

v.

CECIL W. MILLER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause imposes any limitations on an award of punitive damages where a federal district court in a diversity action has exercised unrestrained discretion in awarding $10 million in punitive damages against petitioners in ongoing litigation and where additional awards of actual and punitive damages may be assessed, in unlimited and unpredictable amounts.

2. Whether the Excessive Fines Clause of the Eighth Amendment applies to an award, in a diversity action, of punitive damages, designed to "punish" petitioners and "deter" others, and, if so, whether an award of $10 million in this case is excessive.

3. Whether judicial application of a damage rule that permits recovery of compensatory damages many times in excess of the value of real property to "compensate" for temporary and partial damage to that property violates either the Takings Clause or the Due Process Clause.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	10
I. THIS COURT SHOULD CONSIDER WHETHER THE PUNITIVE DAMAGE AWARD IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS	11
A. The Due Process Clause Limits The Imposition Of Arbitrary Punitive Damage Awards	12
B. The Excessive Fines Clause Of The Eighth Amendment Limits The Imposition Of Arbitrary Punitive Damage Awards	15
II. THIS COURT SHOULD CONSIDER WHETHER THE COMPENSATORY DAMAGE AWARD IN THIS CASE VIOLATED THE TAKINGS AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS	18
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
Aetna Life Insurance Co. v. *Lavoie*, 475 U.S. 813 (1986)	12, 15
Ainsworth v. *Combined Insurance Co.*, 763 P.2d 673 (Nev. 1988)	14
Bankers Life and Casualty v. *Crenshaw*, 108 S.Ct. 1645 (1988)	12, 13, 15
Boston Chamber of Commerce v. *Boston*, 217 U.S. 189 (1910)	20
Browning-Ferris Industries of Vermont, Inc. v. *Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988) *cert. granted*, No. 88-556	14
Chicago, B. & Q. R. Co., v. *Chicago*, 166 U.S. 226 (1897)	20
City of Newport v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981)	12
City of Yonkers v. *United States*, 57 U.S.L.W. 3183 (Sept. 1, 1988)	15
Edwards v. *California*, 314 U.S. 160 (1941)	14
Electrical Workers v. *Foust*, 442 U.S. 42 (1979)	13, 16
Furman v. *Georgia*, 408 U.S. 238 (1972)	17
Gertz v. *Welch, Inc.*, 418 U.S. 323 (1974)	12, 16
Hicks v. *Feiock*, 108 S.Ct. 1423 (1988)	12
Ingraham v. *Wright*, 430 U.S. 651 (1977)	14, 15
Giaccio v. *Pennsylvania*, 382 U.S. 399 (1966)	14
Kennedy v. *Mendoza-Martinez*, 372 U.S. 144 (1963)	15, 16
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)	20
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 (1893)	21-22
Nollan v. *California Coastal Comm'n*, 107 S.Ct. 3141 (1987)	20
O'Neil v. *Vermont*, 144 U.S. 323 (1892)	17
Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972)	14
Rosenbloom v. *Metromedia, Inc.*, 403 U.S. 29 (1971)	13

TABLE OF AUTHORITIES—Continued

	Page
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984)	21
Silkwood v. *Kerr-McGee Corp.*, 464 U.S. 238 (1984)	12
Smith v. *Wade*, 461 U.S. 30 (1983)	15
Solem v. *Helm*, 463 U.S. 277 (1983)	17
United States v. *Batchelder*, 442 U.S. 114 (1979)	14
United States v. *Evans*, 333 U.S. 483 (1948)	14
Constitutional Provisions and Statutes	
28 U.S.C. § 1254(1)	2
U.S. Const. amend. V	*passim*
U.S. Const. amend. VIII	*passim*
U.S. Const. amend. XIV	*passim*
Kan. Ann. Stat. § 65-170d	22
Other Authorities	
U.S. Dept. of Justice, Tort Policy Working Group, Update on the Liability Crisis (1987)	14
Freund, Constitutional Law (1977)	20
Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986)	14
W. Prosser, Law of Torts (4th ed. 1971)	12
Restatement (Second) of Torts, § 908 (1979)	12
Stoebeck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057 (1980)	21

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cudahy Company ("Cudahy") and General Host Corporation ("General Host") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. One of the three questions presented in this case parallels the Eighth Amendment punitive damages issue which the Court already has decided to review in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, No. 88-556. At a minimum, therefore, this petition should be held pending the determination of *Browning-Ferris* on the merits. The other two questions presented are independently worthy of this Court's review, so that regardless of the outcome in *Browning-Ferris*, this petition should be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (app. at 1) is reported at 858 F.2d 1449 (1988). The opinion of the district court denying petitioners' motion for partial summary judgment (app.

at 178) is reported at 567 F. Supp. 892 (D. Kan. 1983). The opinion of the district court holding petitioners liable and imposing compensatory and contingent punitive damages (app. at 116) is reported at 592 F. Supp. 976 (D. Kan. 1984). The opinion of the United States Court of Appeals for the Tenth Circuit dismissing petitioners' appeal from the 1984 district court opinion as premature (app. at 111) is not reported. The opinion of the district court denying petitioners' post-trial motions, rejecting all proposed remedial action plans and imposing a $10 million punitive damage award (app. at 25) is reported at 656 F. Supp. 316 (D. Kan., 1987).

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1988. The petition for rehearing was denied on November 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed . . . .

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

1. This is a diversity action based on damage to real property. Respondents claimed that the salt mining operations of the Lyons, Kansas plant of American Salt Company ("American Salt") and its predecessors over a 60 year period caused the pollution of an underground aquifer which passes under the plant and flows thereafter under respondents' lands. The presence of salt in the aquifer rendered the water unfit for agricultural irrigation and thereby reduced the value of respondents' farm lands.[1] At the time the lawsuit was filed (May 31, 1977), American Salt was an operating division of petitioner Cudahy Company, which had been a subsidiary of petitioner General Host for about six years.[2]

Respondents are owners and lessees of approximately 2800 acres of farm land with a value, according to their own calculations, of $1,100 dollars an acre or a total value of $3.08 million. Respondents sought compensation for the permanent decrease in the value of their land due to their long-term inability to use the contaminated water in the aquifer to grow irrigated crops. The salt water

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[1] The only contaminant at issue is sodium chloride or common table salt.

[2] In 1972 General Host acquired all of the stock of Cudahy, then a public company and one of the nation's major meat packers. American Salt Company was a minor subsidiary of Cudahy. For 1977, the year that this action was filed, General Host had a net worth of about $45 million and less than 10% of its total assets were invested in American Salt. At year end 1983, General Host's net assets were about $147 million—not $450 million as stated by the trial court. This increase of about $100 million was largely attributable to gains on sales of businesses and the sale of common stock or conversion of debt into common stock.

contamination did not affect non-irrigated crops and therefore the dry land value of the farmland was undiminished. Thus, respondents sought total compensatory damages of $1.26 million (or $450 dollars per acre), the difference between the local fair market price per acre of irrigable land ($1,100 per acre) and dry land ($650 per acre). Complaint, 10.[3]

2. In June 1983, the district court denied petitioners' motion for partial summary judgment based on the applicable two-year statute of limitations. Petitioners argued—and the court later found—that the salt water pollution of the aquifer had existed since at least the 1940's. App. at 125-138.[4] Moreover, all of the respond-

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[3] Corn, which requires irrigation in that part of Kansas, is usually more profitable than dryland crops, such as wheat and milo. Nevertheless, respondents could, and did, "grow unirrigated wheat and milo crops of considerable value each year." App. at 139.

[4] Various solution mining techniques used by American Salt (or its predecessor) from the outset of operations in 1908 until they were discontinued by the 1960's allowed substantial amounts of salt water to escape into the aquifer. *See* app. at 126-137; Brief for Defendants-Appellants at 8-10, *Miller* v. *Cudahy Company*, No. 87-1502 (10th Cir., July 23, 1987). Because the aquifer flows beneath the plant and respondents' properties at the glacial rate of only one mile every ten years or more (app. at 119) and because a natural clearing of salt from the aquifer could take up to 200 years (app. at 78), pollution from past operations will continue to affect the groundwater under respondents' land for many decades even though no further salt escapes from American Salt's property.

For the past thirty years, American Salt has been engaged in pollution control and abatement activities. *See, e.g.*, Tr. 27-663; Brief for Appellants, No. 87-1502 (10th Cir., July 23, 1987). at 13-20. Indeed, respondents' expert conceded that ongoing groundwater monitoring instituted by American Salt suggested a gradual clearing of salt pollution. Tr. 15:2044-48, 2100. Respondents' expert also testified he could not state that pollution occurring since 1977 had contributed even as much as 1% of the salt in the aquifer. Tr. 33:80-82.

ents (except one) admitted at trial that they had known of the salt pollution since 1970 at the latest.[5]

Nevertheless, despite the permanent nature of the injury, the district court concluded that the statute of limitations did not bar respondents' claims. Instead, the court stated that respondents' allegations of continuing nuisance were sufficient to plead a "temporary" injury arising from an "abatable nuisance." App. at 206, 208-212. Under the court's interpretation of Kansas law, such injuries give rise to claims for "temporary" damages that may be filed every two years "at least so long as some acts of pollution continue" or for as long as the "temporary" injury persists. Under the latter standard, because an accelerated cleanup of existing salt pollution could take up to 100 years, the biennial litigation in this case could continue well into the twenty-first century.[6]

Following a bench trial, the district court concluded that the salt plant constituted a "continuing nuisance" which was responsible for the injury in question, *i.e.*, respondents' inability to use the groundwater to grow

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[5] *See* Brief for Defendants-Appellants at 9-10, *Miller* v. *Cudahy Company*, No. 87-1502 (10th Cir., July 23, 1987).

[6] Under this doctrine of "temporary damages," the statute of limitations was held to preclude plaintiffs from recovering compensatory damages prior to two years before they filed suit (app. at 211-212), but to allow future recovery of "temporary" damages in two-year increments for as long as the damage standard is met. No such time limitation was applied with respect to the award of punitive damages. Indeed, General Host clearly was held liable in punitive damages for conduct that occurred long before it owned American Salt. Respondents already have filed their next two lawsuits for compensatory and punitive damages. *See Brothers* v. *American Salt Co*, Civ. No. 84-1637-T (D. Kan.) (requesting an additional $2 million in compensatory damages and an additional $25 million in punitive damages); *Heirs of Sharpe* v. *American Salt Co.*, Civ. No. 87-1345-K (D. Kan.).

irrigated crops. "Because irrigated corn would be more profitable for the plaintiffs than the dryland crops," the court found that respondents' damages properly would be measured "to the extent of these lost crop profits," instead of reduced rental value. App. at 139. Based on a calculation by respondents' expert of the differences in profits between theoretical irrigated corn crops and theoretical dryland crops, the court awarded $3,060,000 in damages for "lost crop profits" for 1975-1983. App. at 138-142.[7]

The district court also held that it had the equitable power to order a cleanup but lacked "sufficient knowledge or information to order the defendants to undertake any particular remedial program." App. at 125. The court therefore entered a contingent punitive damage award of $10 million and ordered petitioners to conduct a remedial investigation.[8] App. at 153-154, 176. The $10 million

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[7] This award of "temporary" damages far exceeded the undisputed amount of permanent damage to the land—the difference between the local fair market price of irrigable land ($1,100 per acre) and dry land ($650 per acre). Such an award of permanent damages—$1,260,000 for 2800 acres—is precisely what respondents sought in their original complaint. Moreover, even if "temporary" damages were appropriate, the award far exceeded the undisputed testimony regarding the reduced rental value of the property over the course of nine years (*i.e.*, $715,260). *See* app. at 141; Def. Exhibit Z-7.

[8] The $10,000,000 punitive damages figure was based in part on an erroneous calculation of General Host's 1983 net assets as $450 million. In fact, General Host's total assets for that year were about $450 million; its 1983 net assets were $147 million. This basic error —undisputed by respondents—was repeatedly brought to the attention of the district court, but the court nevertheless ignored its mistake.

Moreover, although there was a complete absence of evidence of any type of abuse of the corporate form which would warrant "piercing the corporate veil," the court nevertheless held—on a novel "agency" theory—that General Host was liable for all of the damages on the ground that it failed to cause a division of its subsidiary to terminate the division's president's employment. App. at 121-125.

contingent punitive damage award was subject to reduction in "whole or in part," if the defendants proposed and implemented a feasible remediation plan. App. at 174, 175; May 23, 1986 Opinion and Order.

For almost two years, petitioners conducted the court-ordered remedial investigation, app. at 95-101,[9] and the district court held a series of extensive evidentiary hearings on the status and results of the investigation.[10] In their April 1986 Report, the petitioners submitted to the district court a proposed remedial plan—the Ten Interceptor Well Plan—that had the approval of respondents' expert, petitioners' experts, and three interested Kansas state agencies. App. at 84-88. During the one-year period between petitioners' submission of this "favored plan" and the issuance of the court's final opinion, American Salt and Cudahy entered into a consent decree with the Kansas Department of Health and Environment ("KDHE") and agreed to implement the Ten Interceptor Well Plan as generally described in the April, 1986 report to the court. See April 1986 Remedial Report, 23.[11] Once

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[9] The remedial investigation and reports required the generation of enormous amounts of scientific and engineering data and evaluations which cost over $1.7 million dollars to the petitioners. App. at 99. The $1.7 million dollar cost of developing the remedial plan includes only out-of-pocket costs of outside experts and drilling crews and does not include the thousands of man-hours spent by American Salt personnel on this unprecedented enterprise.

[10] Based on the results of the remedial investigation, the court held that its 1984 findings on remediation times (5 to 15 years with acceleration, 30 years naturally) "have proved to be off by . . . a factor of ten to twenty." App. at 76; app. at 97 (aggressive remedial plan would take 75-150 years to cleanse aquifer).

[11] The Ten Well Interceptor plan will accelerate the remediation process so that the groundwater will be irrigable in 70-100 years. This plan, which will cost in excess of $4.8 million (including the $1.7 million remedial investigation), is the first known implementa-

implementation of the plan (which was endorsed and developed in conjunction with respondents' expert) was assured, respondents belatedly voiced an objection to any court ordered plan and stated a preference to receive the $10 million instead. App. at 99-101, 106-107. Based largely on this objection, the district court held that "no feasible [remedial] plan has been presented" and that petitioners had proceeded in "bad faith." App. at 105-107. Accordingly, the court refused to remit any of the $10 million punitive damage award.[12]

3. On appeal, the Tenth Circuit affirmed in all major respects.[13] Despite the 1987 finding of the district court that the pollution was "not remediable within a reasonable time" (app. at 76, 98, 108), the court of appeals, in its ruling on the "temporary/permanent" damages question, declined to look beyond the 1984 trial record and concluded that "it is apparent to this court that . . . the cleanup process can be . . . achieved within a reasonable time." App. at 11. Given this "factual" conclusion (and a determination that the contrary findings made in the

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tion in the United States of a program to accelerate cleanup of aquifer saltwater pollution. Tr. Jan. 1986 Hearing, 2:85-88.

With full knowledge of the court's findings and the remedial investigation results, the KDHE determined not to impose any civil fine on American Salt or Cudahy (and to completely excuse General Host from its proceedings), although it had statutory authority to impose civil fines. Thus, the decision of the trial court in this case to impose its own "fine" stands in direct contradiction to the judgment of the Kansas legislative (*i.e.*, in setting the range of penalties for the conduct at issue) and executive branches (*i.e.*, the KDHE determination that no fine was warranted).

[12] The district court also imposed over $2 million in interest on the "contingent" punitive damages award for the time that petitioners were engaged in the court-ordered remedial investigation.

[13] The only issue on which the judgment of the district court was not affirmed was the assessment of post-trial expert witness fees. App. at 24.

subsequent "remedial" phase of the proceeding would not be considered in determining liability), the court of appeals concluded that respondents' claim properly was characterized as "a continuing nuisance causing temporary damages." *Id.* at 12. Thus, the court held that the district court did not err in denying petitioners' statute of limitations defense.

The court of appeals also relied on its finding that the damages were "temporary" in affirming the lower court's holding on actual damages. Although the court apparently recognized that the measure of "temporary" damages in question would substantially exceed the recovery for permanent damages (*i.e.*, the diminished market value of the land) and that the decision below could give rise to a virtually endless cycle of biennial "temporary" damage actions, the court declined to set aside the district court's ruling regarding the "proper measure" of compensatory damages. *Id.* at 13-15.

The court also held that the amount of actual and punitive damages awarded by the district court was "not clearly erroneous" or an abuse of discretion. App. at 15. With respect to petitioners' argument that the punitive damage awards violated the "[E]ighth and [F]ourteenth [A]mendments to the United States Constitution," the court held that it could find no "persuasive federal constitutional authority" to support that argument. App. at 19.

On Petition for Rehearing, petitioners argued that if the court of appeals were correct in interpreting state law "to permit a property damage award exceeding the value of the property, such a state rule would violate both the Takings and . . . Due Process Clauses of the Fifth and Fourteenth Amendments." See Petition for Rehearing and Suggestion of Rehearing En Banc at 8, *Miller* v. *Cudahy Company*, No. 87-1502 (October 21, 1988). The petition for rehearing was denied "on the merits" by the

Tenth Circuit on November 1, 1988. See Order Denying Petition for Rehearing, *Miller* v. *Cudahy Company*, No. 87-1502 (Nov. 1, 1988). App. at 215.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a clear opportunity to decide whether and to what extent the Due Process Clause, the Excessive Fines Clause or the Takings Clause of the United States Constitution imposes substantive limitations on the discretion of a court to impose damage awards under state law. The courts below have assessed an extraordinary damage award against petitioners which, to date, exceeds $18 million (including interest) for *partial* damage to land that has an undisputed *total* undiminished market value of less than one-fifth of the damage award. But that is not all. The lower courts' damage meter continues to run beyond the $18 million figure, and potentially will continue to run for most of the twenty-first century. Under the decisions below, every two years—for 75, 100, or even 150 years—there may be a new award of additional damages. The $18 million award in this case can be sustained only if this Court holds that the Constitution provides absolutely no protection to a defendant against excessive damage awards in civil litigation under state law.

The petition in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, No. 88-556 ("*Browning-Ferris*"), which the Court already has decided to review, raises one important issue concerning the constitutional limitations on damages: whether the Eighth Amendment's prohibition against excessive fines imposes any limit on the imposition of punitive damages. This petition presents two additional, related, and equally important questions. One of them—the limitations on punitive damages imposed by the Due Process Clause—may or may not be reached in *Browning-Ferris*. But the present case also raises at least one constitutional issue that

is unquestionably not before the Court in *Browning-Ferris*: whether the imposition of a compensatory damage award which admittedly will exceed, by a substantial multiple, the value of the property that is damaged violates either the Takings Clause or the Due Process Clause. At a minimum, this Court should hold this petition pending disposition of *Browning-Ferris*. But no matter how the Court decides *Browning-Ferris*, it still should grant this petition in order to consider the two fundamental and recurring issues squarely presented by this case but not by *Browning-Ferris*.

I. THIS COURT SHOULD CONSIDER WHETHER THE PUNITIVE DAMAGE AWARD IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS

The punitive damages imposed in this case violated both the Fifth and Fourteenth Amendments' prohibition against deprivations of property without due process and the Eighth Amendment's prohibition against excessive fines. The basic facts relevant to both the due process and excessive fines issues are simple and uncontested. The district court imposed a $10 million punitive damage award in order "to adequately punish the corporate wrongdoers and to serve as a credible example to restrain and deter others . . . ." App. at 153-154. Neither the punitive nature nor the excessive magnitude of the award in this case seriously can be challenged.[14]

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[14] Net annual profits for the salt plant have ranged from $1 million to $1.75 million since 1975. Nevertheless, the court stated that the size of the award was "appropriate" because of General Host's alleged net assets of over $450 million. App. at 153-154. The imposition of "punishment" of such magnitude on General Host's shareholders was unwarranted in light of the fact that General Host did not acquire American Salt until 1972 and most of the cited conduct took place years, if not decades, prior to that time. In fact, a pollution abatement program was well underway at the time that General Host acquired American Salt. *See supra*, at 4 n.4.

A. The Due Process Clause Limits The Imposition Of Arbitrary Punitive Damage Awards

Two years ago, in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), the Court stated that the argument that the "lack of sufficient standards governing punitive damages awards . . . violates the Due Process Clause" was an "important issue[] which, in an appropriate setting, must be resolved." Last Term, in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S.Ct. 1645 (1988), the Court granted certiorari but declined, for prudential reasons, to reach the issue whether the imposition of punitive damages could violate the Due Process Clause. This case squarely presents that due process issue in a setting appropriate for resolution by this Court.

1. Justice O'Connor, concurring in part in *Bankers Life*, in an opinion joined by Justice Scalia, observed that it is the inherently arbitrary nature of punitive damage awards that renders them susceptible to due process challenge. *Bankers Life*, 108 S.Ct. at 1656 (the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process"). This is so because punitive damages are intended to punish—not compensate—so there is no objective "actual damages" benchmark against which they may be assessed. *Gertz* v. *Welch, Inc.*, 418 U.S. 323, 350 (1974) (purpose of punitive damages "to punish" and "to deter").[15] Thus—absent some clearly articulated standard for, or limitation on, the award of punitive damages—"the impact of these windfall recoveries is unpredictable and potentially substantial." *Bankers Life*, 108 S.Ct. at 1655

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[15] *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) (punitive damages "intended . . . to punish the tortfeasor"); Restatement (Second) of Torts, § 908 (1979); W. Prosser, Law of Torts 9-10 (4th ed. 1971); *see also Hicks* v. *Feiock*, 108 S.Ct. 1423, 1437 (1988) (O'Connor, J., dissenting) (no "compensatory purpose limits the amount of the fine"); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting).

(quoting *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979)). See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting).

The view expressed in the concurring opinion in *Bankers Life*, that punitive damages such as those imposed here violate the due process guarantee, clearly is correct. Where did the district court's $10 million damage award come from? It bears no relationship, rational or otherwise, to the damage suffered by the respondents (*i.e.*, the lost opportunity to change their manner of farming to irrigation). Nor does it fairly reflect the blameworthiness of General Host.[16] Instead, the district court simply picked a number based on the parent company's perceived net worth, as did the Mississippi courts in *Bankers Life*. But in doing so, the court imposed a penalty wholly out of proportion to the offense and therefore its result is simply arbitrary and in contravention of the Due Process Clause.

2. It is well established that due process requires the state to define clearly the conduct that it intends to make

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[16] In this case, the district court's decision to look to the assets of General Host Corporation as an indication of an appropriate punitive damage award illustrates how entirely arbitrary such awards may be. Despite the complete absence of any facts that would warrant "piercing the corporate veil," *see* Brief for Defendants-Appellants at 52-58, *Miller* v. *Cudahy Company*, No. 87-1502 (10th Cir., July 23, 1987), General Host has been "fined" $10 million based largely on damages allegedly caused by its subsidiary at a time prior to General Host's purchase of Cudahy (in 1972) and of which it was unaware. Under this theory, if IBM—rather than General Host—had purchased American Salt, then IBM's entire net worth would form the basis of an appropriate punitive damages award and plaintiffs presumably would be entitled to hundreds of millions of dollars in punitive damages. Such a system of civil damages, through which the entire net worth of a parent company is threatened by every purchase of assets (no matter how miniscule) and every act of the company's subsidiaries (past and present), could not be more arbitrary.

subject to punishment. See *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Edwards* v. *California*, 314 U.S. 160 (1941). This demand for specificity includes a requirement that the state, through its legislature, provide notice of the maximum penalty for a given act. See *United States* v. *Evans*, 333 U.S. 483, 486-87 (1948). Thus, in the criminal context, the courts' discretion to impose punishment must be limited by statutes that establish "the permissible punishment alternatives" and "demarcate the range of penalties" for particular conduct. *United States* v. *Batchelder*, 442 U.S. 114, 126 (1979).

The force of these due process limits on the state's power to sanction "is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966). Thus, the potential sanctions imposed through the "civil" penalty of punitive damages should be no less subject to due process standards than the imposition of purely "criminal" penalties. See *Ingraham* v. *Wright*, 430 U.S. 651, 669 (1977). As the imposition of multi-million dollar punitive damage awards becomes increasingly commonplace,[17] this Court should grant certiorari

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[17] *See, e.g., Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), *petition for cert. granted*, No. 88-556 (Dec. 5, 1988) (jury awarded compensatory damages of $51,000 and punitive damages of $6 million); *Metromedia, Inc.* v. *April Enterprises, Inc.*, No. 88-625 (petition for a writ of certiorari pending in case involving jury award of actual damages of $3.8 million and punitive damages of $14 million); *Goodyear Tire & Rubber Company* v. *Hodder*, No. 88-626 (petition for a writ of certiorari pending in case involving jury award of actual damages of $3.4 million and punitive damages of $12.5 million, which was reduced on appeal to punitive damages of $4 million); *Ainsworth* v. *Combined Insurance Co.*, 763 P.2d 673 (Nev. 1988) (award of actual damages of $200,000 and punitive damages of $6 million); *see also* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-146 (1986);

and consider the extent to which the Due Process Clause limits the discretion of a court in a common law diversity action to impose punitive damages, based solely on its ad-hoc assessment of how much punishment is enough.

B. The Excessive Fines Clause Of The Eighth Amendment Limits The Imposition Of Arbitrary Punitive Damage Awards

This Court has noted that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases—is a question of some moment and difficulty." *Bankers Life*, 108 S.Ct. at 1651; see *Aetna Life Ins. Co.*, 475 U.S. 813, 828-829 (question whether punitive damages award is impermissible under the Excessive Fines Clause "raise[s an] important issue[] which, in an appropriate setting, must be resolved"); see also *City of Yonkers* v. *United States*, 57 U.S.L.W. 3183, 3184 (Sept. 1, 1988); (Marshall, J., concurring in denial of stay) (quoting *Bankers Life and Casualty Co.*, 108 S.Ct. at 1651).

1. Despite the fact that punitive damages commonly are considered to be an element of "civil" damages, this characterization alone should not preclude application of the Eighth Amendment. As this Court noted in *Ingraham* v. *Wright*:

> [s]ome punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.

430 U.S. 651, 669 n.37 (1977); see also *id.* at 685 (White, J., dissenting); *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-166 (1963).

U.S. Dept. of Justice, Tort Policy Working Group, Update on the Liability Crisis, 47 (1987).

In determining whether a penalty that is nominally civil has the characteristics of a criminal punishment, and therefore is subject to constitutional restrictions primarily applicable to criminal proceedings, the Court has looked to a variety of factors, including:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, [and] whether its operation will promote the traditional aims of punishment—retribution and deterrence . . . .

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted). Applying these standards, punitive damages possess most of the characteristics of a criminal-type sanction. Indeed, as this Court stated, "[p]unitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *Electrical Workers* v. *Foust*, 442 U.S. at 48 (quoting *Gertz*, 418 U.S. at 350). Given the undisputed nature and purpose of punitive damage awards—both in general and in this case (app., 116)—application of the Eighth Amendment's Excessive Fines Clause plainly is warranted.

Moreover, the language of the Excessive Fines Clause is fully consistent with the application of that constitutional provision to sanctions imposed in civil cases. *Compare* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .") *with* U.S. Const. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself"); U.S. Const. amend. VI (provisions of amendment apply "[i]n all criminal prosecutions"). It is clear that when the draftsmen of the Bill of Rights intended to limit their guarantees to the criminal context, they knew how to do so.

2. Having shown that the Eighth Amendment applies to civil actions, the issue remains what constitutes an "excessive fine." Although there are a variety of potentially relevant measures of excessiveness (*Browning-Ferris* Pet. 24-28), one of the core concepts embodied in the Eighth Amendment generally is the notion of proportionality between the punished activities and the penalty imposed. See *Solem* v. *Helm*, 463 U.S. 277 (1983). The punishment—in this case a "fine"—must in some measure fit the offense. *Furman* v. *Georgia*, 408 U.S. 238, 279-280 (1972) (Brennan, J., concurring); *O'Neil* v. *Vermont*, 144 U.S. 323, 323-340 (1892) (Field, J., dissenting). As we have demonstrated previously (*supra*, —), the punitive award in this case was imposed without regard to the fault of General Host or its particular knowledge of any wrongdoing, but rather on the basis of its ownership of American Salt and General Host's net worth. A multimillion dollar award imposed on such a basis is not only arbitrary, but also it is grossly excessive. *Compare Solem* v *Helm*, 463 U.S. at 287 (1983).

In any event, this case should be held pending this Court's decision in *Browning-Ferris*. On December 5, 1988, this Court granted the petition for a writ of certiorari in *Browning-Ferris* on the question whether "an award of $6,000,000 in punitive damages . . . is excessive under the Eighth Amendment or otherwise." *Browning-Ferris* Petition, at I. That case involves a claim of predatory pricing, in violation of Section 2 of the Sherman Act, and a pendent state-law claim for tortious interference with business relations under Vermont law. The jury awarded compensatory damages of $51,000 on both the federal and state claims and punitive damages of $6 million. Browning-Ferris argues that such a punitive damage award, which was measured in terms of the defendant's net worth and annual revenues, is "grossly excessive" under "any objective standard" and therefore violates the Excessive Fines Clause of the Eighth Amendment. *Browning-Ferris* Petition at 24.

Any decision by this Court of the question presented in *Browning-Ferris* clearly would affect the proper disposition of the similar issue in this case. If this Court holds that the Excessive Fines Clause is applicable to an award of punitive damages, then the decision below—which flatly rejected that argument—should be vacated and the court below ordered to reconsider its decision in light of whatever standards for excessiveness this Court sets out in *Browning-Ferris*. Alternatively, even if the Court rejects the Eighth Amendment argument in *Browning-Ferris*, the question will remain whether a standardless, limitless award of punitive damages is permissible under the Due Process Clause. Because this case squarely presents that question, this Court should grant this petition.

II. THIS COURT SHOULD CONSIDER WHETHER THE COMPENSATORY DAMAGE AWARD IN THIS CASE VIOLATED THE TAKINGS AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS

The courts below have already awarded respondents "temporary" compensatory damages that are more than twice the allowable award for permanent damage (*i.e.*, the diminishment of respondents' land values) and that are virtually equal to the full fair market value of their land. According to respondents' own calculations, the total fair market value of their land is $3.1 million and the diminishment in value, if the damage is permanent, is $1.26 million. Respondents already have been awarded $3.06 million in compensatory damages for the *temporary* and *partial diminution* in the value of that land for a nine year period.

Moreover, under the decision below, respondents are still permitted to bring suit to recover additional damages every two years for a period of time that may last

over a century. Respondents already have filed two additional, separate actions for "temporary" injury to their land in which they have sought an additional two million dollars annually in compensatory damages for each two year period. Using the damage formula applied by the courts below and assuming that such biennial actions were allowed to continue until the aquifer is usable again, respondents could be awarded total damages for the partial temporary damage to their land in an amount anywhere from 10 to 20 times the fair market value of that land.

Obviously, the decisions below will have a resounding impact, not only on petitioners, but on any industry which is concerned with environmental liability or any other conduct which could be characterized as a continuing nuisance. The potential exposure to liability arising out of a continuing nuisance theory that permits "temporary" damage recovery to continue for decades until the effects of pollution have been entirely remediated is staggering. Indeed, if virtually unlimited awards of actual and punitive damages can be imposed in addition to multi-million dollar voluntary cleanup costs, the decision below creates a strong disincentive towards investment in any remedial efforts and a strong incentive towards abandonment of a previously polluting facility. Review of the Tenth Circuit's theory of recovery is necessary to eliminate this perverse disincentive.

At first blush, the notion that compensatory damages can constitute an unconstitutional taking is admittedly odd; all damage awards are in some sense a "taking." The state is requiring one private party to pay money over to another. And obviously, such awards are routinely granted without any serious constitutional objection. What distinguishes the damage award in this case, however, is not only its magnitude, but also its recurring

nature. This combination of features converts an ordinary damage award into a confiscatory taking.

By analyzing the effect of the "temporary damages" problem presented in this case against generally accepted principles in the Takings Clause, it becomes apparent that the Takings Clause does have a legitimate role to play in restricting the recovery available to respondents.[18] It is axiomatic that the State of Kansas could not enact a statute which permitted petitioners physically to invade respondents' property (or otherwise substantially destroy or interfere with its use) without paying compensation for such a "taking." See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It is equally clear that the State could not—consistent with the Due Process and Takings Clause—limit the damages for such a "taking" to 50% of the fair market value of the property. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.); see Freund, Constitutional Law, 1102 (1977) ("the elementary principle is that market value at the time of the taking is the proper measure" of damages for the taking of property).

It follows naturally from these principles that the Due Process Clause and the Takings Clause would prohibit a state from giving a landowner the right, at his option, to require his neighbor to "purchase" his property at 10 to 20 times its fair market value.[19] But, that

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[18] The prohibition against the government taking private property without just compensation has been extended to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 239 (1897).

[19] At the very least, the state should be required to demonstrate that such a massive shifting of private resources is "substantially" related to some legitimate public interest. *See Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141 (1987). No such showing has been attempted here.

is, in effect, what the state law damage rules, applied in this case by a federal court, provide. In fact, based on the rulings below, respondents probably would be unwilling to sell their "damaged" property for anything less than a significant multiple of its full market value because the potential income stream of future damages so far exceeds the amount. The lower courts' judgments have effectively converted respondents' farmlands into a gold mine.[20]

The property damage laws of the State of Kansas (as they have been interpreted by the courts below) conceivably permit a decades-long shifting of petitioners' assets to respondents. The "compensatory" damages awarded to date far exceed the amounts necessary to achieve the goal of providing compensation for the injury to respondents' land; instead, they simply amount to a shifting of private resources, which is prohibited by the Takings Clause.[21] See *Monongahela Navigation Co.*

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[20] The remedy for the Due Process Clause claim may not be identical to that for the Takings Clause claim. To the extent that this rule of compensatory damages is arbitrary or fails to meet the rationality requirement of the Due Process Clause, the rule would be an invalid exercise of the police power and its operation could be enjoined—even if compensation were paid. *See* Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1081-82 (1980). If, however, the state has a legitimate interest in "overcompensating" respondents for the dimunition in the value of their land (and the payment of such damages constitutes a public use), then operation of the rule could not be enjoined. *See Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984). Nevertheless, the "taking" of petitioners' property to provide such "damages" (far in excess of any rational computation of the harm caused by petitioners) constitutes an unconstitutional shifting of private resources.

[21] The *only* legitimate state purpose at issue is the provision of a damage award that will fully *compensate* for the damages suffered. Other potential state interests, such as punishment, deterrence or restitution of environmental conditions, are furthered through other means, such as an award of punitive damages (pun-

v. *United States*, 148 U.S. 312, 325 (1893) (Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). In addition, because there is no "rational basis" for the state law damage rules (as applied by the courts below), the imposition of the excessive damages upon petitioners for conduct long since abated (and, in fact, positively remediated) also violates the guarantee of Due Process.

Unquestionably, the decision below will have a long-lasting and detrimental impact that extends far beyond this petition. The decision will create significant uncertainty in areas of this country where historical mining or manufacturing techniques (no longer in use) may give rise to a threat of open-ended damage awards for contamination of water or land which primarily occurred in decades gone by. While compensation for injury to property certainly should be available, even up to the total fair market value of that property, the recovery permitted by the courts below is grossly excessive and therefore this court should grant certiorari and consider the important and fundamental questions of federal law presented in this case.

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ishment or deterrence) or through state environmental law (restitution). *See* Kan. Stat. Ann. § 65-170d (Kansas environmental law providing specific range of penalties).

CONCLUSION

The petition for a writ of certiorari should be granted.

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